EX PARTE OR LATE FILED

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February 24, 1999

BY HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commission
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

Re: CC Docket Nos. 96-115

Dear Ms. Salas:

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a) (1997), please find enclosed an original and two copies of Ex Parte Comments of Allegiance Telecom, Inc. to be filed in the above-referenced docket.

I would also appreciate it if you would date-stamp the enclosed extra copy of this filing and return it with the messenger to acknowledge receipt by the Commission.

Sincerely,

Robert W. McCausland

Robert W. McCausland

cc: Anthony Mastando

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-115
Telecommunications Act of 1996	)	
	)	
Telecommunications Carriers' Use	)	
of Customer Proprietary Network	)	
Information and Other	)	
Customer Information	)	

EX PARTE COMMENTS OF ALLEGIANCE TELECOM, INC.

Allegiance Telecom, Inc. ("Allegiance") hereby submits these *ex parte* comments in the above-captioned proceeding. On June 25, 1998, Allegiance filed an Opposition (the "Allegiance Opposition") to various Petitions for Reconsideration ("Petitions") of the Second Report and Order in this docket, insofar as certain Petitioners ask the Commission to eliminate or modify its rule prohibiting the use of Customer Proprietary Network Information ("CPNI") in "winback" campaigns. In this supplemental filing, Allegiance will address the claims in the United States Telephone Association ("USTA") and Bell Atlantic Petitions that the Commission did not provide adequate notice of or a proper rulemaking record to sustain the "anti-winback" rule promulgated in the Second Report and Order.[1]

The first section of these comments addresses USTA and Bell Atlantic's contention that the CPNI Notice of Proposed Rulemaking ("NPRM") did not provide adequate notice to allow parties

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[1] 47 C.F.R. § 64.2005(b)(3), as adopted in *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Consumer Information*, Second Report and Order and Further Notice of Proposed Rulemaking, 13 F.C.C. Rcd. 8061, 8126, 8127 (1998) (hereinafter *Second Report and Order*).

to comment on possible anti-competitive uses of CPNI. The second section of these comments addresses the contention that the Commission did not compile a proper rulemaking record in the Second Report and Order to support the conclusion that the use of CPNI to try to "winback" former or soon-to-be former customers should be prohibited.

I. USTA and Bell Atlantic's Claim That the Anti-Winback Rule Was Improperly Noticed Is Without Merit

Under the Administrative Procedure Act, before promulgating a rule, a federal agency must provide "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[2] This "description of the subjects and issues involved" has generally been interpreted by the courts as requiring enough notice to any affected parties to allow those parties to comment and develop evidence and other support for their positions.[3] In the instant case, the Commission provided a cogent summary of the issues that were involved in the CPNI proceeding in the NPRM, and requested comments on possible new rules concerning the question of "whether AT&T, the BOCs, and GTE continue to possess a competitive advantage with respect to access to and use of customer CPNI, as well as whether any other entities, such as independent LECs, now possess similar advantages."[4]

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[2] 5 U.S.C. §553(b)(3) (1994).

[3] *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

[4] *See Telecommunications Carriers' Use of Customer Proprietary Network Information and other Customer Information*, Notice of Proposed Rulemaking, 11 F.C.C.Rcd. 12513, 12530 (1996).

The references in the NPRM to potential "competitive advantages" to incumbent carriers based on access to CPNI put these carriers on notice that the Commission was considering restrictions on how they might use this information in the competitive arena. Given the Commission's emphasis on competition, it should have been clear to any reasonable person that the use of CPNI in marketing campaigns was within the scope of the proposed rules. The final rules approved by the Commission represent the logical outgrowth of this discussion in the NPRM. In reviewing the adequacy of notice given by an agency in formulating a legislative rule, courts often look at whether the final rule promulgated represents a "logical outgrowth" of the proposals noticed in the NPRM.[5] In this case, the use of CPNI in "winback" campaigns is simply one context in which incumbents may derive a competitive advantage from their access to customer data, and the adoption of regulations on this subject is a logical outgrowth of the Commission's proposal to act in this area. In fact, a "winback" is perhaps the most pernicious possible use of CPNI for marketing purposes, and it would have been absurd for the Commission to limit other uses of CPNI while ignoring "winback" marketing.[6]

The fact that the NPRM did not specify verbatim the text of a proposed rule, or the exact specifics of a proposal is irrelevant. Under section 553(b)(3) of the APA and relevant case law, all that is required of an agency is to notify affected parties of the subjects and issues of a contemplated

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[5] *Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

[6] As explained in the Allegiance Opposition at 10-11, the use of CPNI for "winback" purposes is inherently anti-competitive because it allows the incumbent to use network data that it gathered through its control of bottleneck facilities as a tool to target particular customers who might otherwise switch to competitive services when they become available.

rule, and to afford them an opportunity to comment on those issues.[7] The NPRM certainly gave interested persons an opportunity to comment on any use of CPNI to gain a competitive advantage; the Commission was not required to itemize each and every potential use of information that it was thinking about mentioning in its regulations. Acceptance of USTA and Bell Atlantic's contentions that the rulemaking process consists of a system where proposed rules must be specified in excruciating detail, and then be adopted only if parties comment on the minute details of each proposal, is unwarranted by the APA, and would could lead to unnecessary ossification of the Commission's administrative process.

II. Claims That the Rulemaking Record Provides Insufficient Support for the "Anti-Winback" Rule Are Similarly Without Merit

The second prong of USTA and Bell Atlantic's APA attack on the "anti-winback" rule appears to revolve around the vague contention that the final rule is not supported by the record in the Second Report and Order. This analysis should be rejected for a number of reasons. First, the "anti-winback" rule plainly reflects the legislative intent of section 222(d)(1), which states that carriers may use customer CPNI, in certain situations as permitted by section 222(c)(1), to "initiate, render, bill, and collect for telecommunications services."[8] In the case of "winback" campaigns directed at soon-to-be former customers or customers that have expressed a definite intention to leave a provider, the carrier is not attempting to initiate service with that customer, but instead is

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[7] *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 524 (1978) (stating that "section [553] of the [APA] established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking procedures.").

[8] 47 U.S.C. § 222(d)(1) (1994).

trying to convince the customer not to terminate their service. As pointed out in the Allegiance Opposition (at 8-9), "the 'win-back' campaign is essentially a marketing effort aimed at offering new service in the future to a former customer, not part of the provision of existing service under a continuing customer relationship. Since Congress limited CPNI use to the provision of existing or related services, prohibiting the use of CPNI to regain a former customer is the *only* analysis consistent with Section 222 of the Act." (Emphasis added.) Thus, the "anti-winback" rule flows almost directly from Congressional pronouncement, and not from any "reasonableness" determination by the Commission.[9] The rulemaking record is not required to be as extensive for rules that implement Congressional directives, as opposed to rules that interpret broad policy objectives.

Second, with regard to the rulemaking record itself, the allegations of USTA and Bell Atlantic contain many fallacies. Bell Atlantic, in its Petition claims that the "anti-winback" rule was promulgated "with no record support."[10] USTA similarly contends that the rule was promulgated "without the benefit of a record on which to predicate reasoned decision-making."[11] Both contentions are untrue and without merit. In the Second Report and Order, the Commission clearly showed that it considered the record on the winback issue by concluding that "[w]e also do not believe, contrary to the position of AT&T, that section 222(d)(1) permits the former (or soon-to-be

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[9] Indeed, the Commission could have issued an "interpretative" rule, without any notice and comment requirements at all, simply declaring its view that the statute does not permit the use of CPNI in "winback" campaigns. *See* 5 U.S.C. § 553(b)(3)(A). If the Commission concludes, contrary to the arguments set forth above, that its substantive rule should be reconsidered based on procedural deficiencies, it should consider issuing such an interpretative rule at the same time.

[10] Bell Atlantic Petition at 16.

[11] USTA Petition at 6.

former) carrier to use the CPNI of its former customer . . . for customer retention purposes."[12] In addition, the Commission stated that "use of CPNI in this context is not statutorily permitted under section 222(d)(1), insofar as such use would be undertaken to market a service to which a customer previously subscribed, rather than to 'initiate' a service. . . ." This explanation shows that the Commission considered the alternative position of allowing the use of CPNI for "winback" campaigns, and rejected this option based on its reading of the statute and competitive concerns.

The Commission's explanation of its decisional process, while terse, is all that is required under the APA. The Commission expressly considered the probable anti-competitive effects of allowing the use of CPNI in "winback" campaigns, considered alternative comments, and promulgated a rule that follows Congressional directives.[13] Therefore, the Commission should also reject USTA and Bell Atlantic's arguments regarding the sufficiency of the rulemaking record.

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[12] *Second Report and Order*, 13 F.C.C. Rcd. at 8126.

[13] *See Motor Vehicle Manufacturers Assn. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1982). In that case, the Court stated the general guidelines for what constitutes an "arbitrary and capricious" record:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id.

III. Conclusion

The Commission's decision to adopt the "anti-winback" rule represents rational decision-making that comports with section 553 of the APA and interpretive case law. The Commission considered the other possible option, responded to comments, and issued a rule that follows Congressional directives and is plainly reasonable in light of the evidence. As such, the Commission should reject USTA and Bell Atlantic's Petitions for Reconsideration on the "anti-winback" rule.

Respectfully submitted,

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